BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 8

READT 016/18

IN THE MATTER OF	A charge laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 413
AGAINST	BERNADETTE MAKUINI MARR Defendant
Hearing:	26 – 30 November, 3 – 4 December 2018
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Mr N O'Connor, Member
Appearances:	Mr S Waalkens, on behalf of the Committee Mr J Wain, on behalf of Ms Marr
Date of Decision:	27 February 2019

DECISION OF THE TRIBUNAL

Introduction

[1] Complaints Assessment Committee 413 ("the Committee") has charged Ms Marr with misconduct under s 73(a) of the Real Estate Agents Act 2008 ("the Act"). The Committee alleges that Ms Marr engaged in conduct that would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[2] The essence of the particulars of the charge is that Ms Marr:[1]

[a] engaged another person (Ms Guttenbeil) as a front to hide the fact that she was purchasing her own family home at a mortgagee sale by auction (particular (a));

[b] inserted words ("+/or nominee Barry Ian Parkins") into a contract of sale by auction of the property without advising the mortgagee (particular (c));

[c] used a sale and purchase form in the name of the agency at which she was engaged to create a sale and purchase agreement of the property, dated 2 August 2013, from Ms Guttenbeil to two of her children, in breach of the agency's internal protocol (particular (b));

[d] forged the signature of the vendor, Ms Guttenbeil, on that agreement for sale and purchase (particular (e));

[e] unilaterally added a "contemporaneous settlement" clause to that agreement for sale and purchase (particular (f));

[f] created a further sale and purchase agreement, dated 9 August 2013, which specified a purchase price and deposit which were greater than the actual purchase price and deposit (particular (g)); and

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[1] The above summary is set out in the chronological order of the alleged conduct. This is not the order in which the particulars of the charge are set out.

[g] instructed her solicitor to lodge a caveat on the title to the property, on behalf of herself and her two children, citing the 2 August 2013 agreement in support of her claim to have an equitable interest in the property (particular (h)).

Facts

[3] Ms Marr is a licensed salesperson, and at the relevant time was engaged at Bayleys Real Estate ("the Agency"). The charge against Ms Marr concerns her family home in Parnell, Auckland ("the property").

[4] The property was bought by Damian Marr (Ms Marr's son) and David Askew on 21 December 2007, with mortgage finance from Linkloan Trustees Ltd ("Linkloan"). Ms Marr was responsible for making mortgage payments. In November 2012, she fell behind in making payments.

[5] All subsequent events occurred between February and August 2013. On 26 February, Linkloan issued a Notice of Default, specifying the amount required to remedy the default as $13,995.25, together with costs of $950.00, payable by 5 April. Ms Marr made payments to Linkloan between March and July, but these were not sufficient and Linkloan subsequently began a process for the property to be sold by auction on 17 July.

[6] Ms Marr's evidence was that preventing the mortgagee sale of her home was her priority. On 1 July, she consulted a mortgage broker, Ms Shepherd. Because of her financial circumstances, Ms Marr required 100% finance in order to redeem the mortgage. On 12 July, Ms Shepherd advised Ms Marr that she had an offer of first mortgage finance from Cressida Finance Ltd ("Cressida"). This was not sufficient to discharge the mortgage to Linkloan, and Ms Shepherd was seeking second mortgage finance for Ms Marr of $52,000. This proved to be difficult.

[7] On 16 July, a "second tier" lender gave Ms Shepherd the name of Mr David Barton as a person who might be able to assist. Mr Barton advised her that this would not be a problem, as he specialised in "mortgagee sale rescues". Later that day, Mr

Barton sent Ms Shepherd an offer of finance comprising first mortgage finance of $400,000, and two personal loans, each of $20,000. Ms Shepherd forwarded the offer to Ms Marr.

[8] Neither Ms Marr nor Ms Shepherd was aware that Mr Barton had been convicted of offences of dishonesty, and had served terms of imprisonment for three years (following his having pleaded guilty to 81 charges described as "commercial fraud"), and (previously) three years and six months imprisonment (on similar fraud charges).

[9] Mr Barton introduced a funder, Mr Barry Parkin, to assist Ms Marr to buy the property at the auction. The proposal was that Mr Parkin would pay the deposit, then allow Ms Marr time to arrange funding to complete the sale. Mr Parkin's conditions included a reduction in the deposit payable so as to reduce his exposure, extension of the settlement period, and that a "Plan B" be established to protect his position in the event that Ms Marr was not able to arrange funding. Thus, while the intention was that Ms Marr's three adult children would eventually be the purchasers, Mr Parkin would be named on any auction contract of sale as a specific nominee. Ms Marr agreed to these conditions.

[10] Ms Marr asked a colleague, Ms Guttenbeil, to bid for the property at the auction on her behalf. Ms Guttenbeil agreed to do so. Ms Marr introduced her to Mr Barton, and told her that he would organise the finances. She also told Ms Guttenbeil that Mr Barton would tell her when to bid, and how high to go. Ms Guttenbeil attended the auction, and Mr Barton introduced her to Mr Parkin. Ms Marr did not attend. Mr Parkin approved Ms Guttenbeil's bid up to $425,000, but the property was passed in. Subsequently, on Ms Marr's and Mr Parkin's instructions, Ms Guttenbeil signed a memorandum of contract to buy the property for $435,000 ("the auction sale contract"). The terms of the auction sale contract included the reduced deposit and extended settlement period, but did not name Mr Parkin as nominee.

[11] Mr Barton told Ms Marr that Mr Parkin would not pay the deposit unless he was named as nominee. Ms Marr instructed Ms Guttenbeil to add Mr Parkin as nominee. Ms Guttenbeil added the words "+/or nominee Barry Ian Parkins" to the auction sale contract and signed and initialled alongside the addition ("the auction nomination

provision"). Ms Guttenbeil gave the auction nomination provision to Ms Marr, who sent it to Mr Parkin. She did not provide the mortgagee with a copy. Mr Parkin paid the deposit on 19 July.

[12] A copy of the auction sale contract (which contained the nomination provision in favour of Mr Parkin) was sent to Mr Phillips (Ms Guttenbeil's solicitor) by the agency which conducted the mortgagee sale.

[13] Ms Marr continued to try to arrange finance. The offer from Cressida was not pursued. Mr Barton did not find her a lender, and Ms Marr lost confidence in him. Ms Marr then approached another mortgage broker, Ms Samu. Ms Samu advised Ms Marr that the problem with arranging finance was that the auction sale contract did not provide for a nomination from Ms Guttenbeil to Ms Marr's children. Ms Guttenbeil advised Ms Marr on 30 July by email that she was happy to nominate them as purchasers.

[14] Ms Samu then suggested that Ms Marr replace Ms Guttenbeil's "nomination" email with a sale and purchase agreement from Ms Guttenbeil to her children. On 1 August, Ms Marr prepared a sale and purchase agreement for the sale of the property from Ms Guttenbeil to two of her children, Keith and Charlotte Marr.

[15] Ms Marr said she did this by taking a blank Agency agreement to a print/copy centre in Auckland, and having them insert the details of the vendor, purchasers, estate, and purchase price on the first page. The Agency protocols did not permit the use of an Agency-branded sale and purchase agreement for a private sale by a salesperson, and Ms Marr did not seek permission to do so.

[16] As a result, the agreement appeared to be (but was not) a printed agreement for sale and purchase produced by the Agency. On the front page it named Ms Guttenbeil as vendor, and Keith and Charlotte Marr as purchasers, and specified the purchase price as $435,000. Ms Marr inserted Keith and Charlotte Marr's names, and an address, into Schedule 2. She also inserted, by hand, a list of chattels included in the sale. Two originals of the agreement were signed by Keith and Charlotte Marr that day.

[17] Ms Marr arranged to meet Ms Guttenbeil at a café on 2 August. Ms Marr said in evidence that the meeting lasted for about 30 minutes, they sat at a concrete table outside the café, and Ms Guttenbeil signed and initialled the two originals of the agreement. Ms Guttenbeil said that the meeting was very brief, she does not (and did not on this occasion) sit outside the café, and she did not sign any documents. Whether Ms Guttenbeil signed an agreement for sale and purchase on 2 August is the key issue for determination by the Tribunal.

[18] Ms Marr said in her formal statement of evidence that she then inserted, by hand, the date "2 August 2013", on the front and back pages of both signed originals of the agreement. At the hearing, counsel for Ms Marr, Mr Wain, advised the Tribunal that Ms Marr entered the date "2 August 2013" on the front page of both of the signed agreements, and on the back page of one of them, and that she entered the date "August 2 2013" on the back page of the other.

[19] The agreement on which the date "2 August 2013" appears on both the front and back pages will be referred to as "the Q1 agreement". The agreement on which the date "August 2 2013" appears on the back page will be referred to as "the S5 agreement". In all other respects, the two signed agreements were identical. From this point, unless it is necessary to distinguish between them, we will refer to both the Q1 and S5 agreements as "the 2 August agreements".

[20] Ms Marr retained both the Q1 and S5 agreements. She did not provide Ms Guttenbeil with either original agreement, or a copy, and she did not forward either the Q1 or the S5 agreement to her solicitor or any other third party until 16 August.

[21] Ms Marr was still not able to arrange loan finance. On 8 August, Ms Samu advised her that the ANZ bank had declined her application for finance, because the deposit was too small. Ms Marr said Ms Samu suggested that a fresh "nomination agreement" could be made between Ms Guttenbeil and the Marr children, showing a "purchase price" of $560,000, and a "deposit" $125,000. She said this would mean that the finance required from the bank would still be $435,000, being the amount required to settle with the mortgagee. However, it depended on Ms Marr being able to pay the increased deposit, and obtaining legal advice.

[22] Ms Marr did not create a "nomination" agreement. She prepared a further sale and purchase agreement ("the 9 August agreement"), by handwriting Ms Guttenbeil's name as vendor, and Keith and Charlotte Marr's names as purchasers, onto two blank Agency sale and purchase agreement forms. She recorded the purchase price as $560,000, and the deposit as $125,000. She then removed the front pages of the Q1 and S5 agreements, and replaced them with the handwritten pages. Her evidence was that in all respects other than the replacement of the first pages, the 9 August agreement remained the same as the Q1 and S5 2 August agreements.

[23] Keith and Charlotte Marr initialled the handwritten pages of the 9 August agreement the same evening.

[24] Ms Marr and Ms Guttenbeil met on 9 August. Ms Marr's evidence was that Ms Guttenbeil initialled the two handwritten pages of the 9 August agreement. Ms Guttenbeil's evidence was that she signed Schedule 2 of one original agreement, and did not initial that or the other original agreement. She also said she did not pay any attention to what she was signing, as she was preoccupied and stressed at the time by having to deal with an urgent problem with her car.

[25] On 12 August, Ms Marr and Ms Guttenbeil met with Mr Phillips, who had been asked to act for both Ms Guttenbeil and Ms Marr. Mr Phillips' advice was that the 9 August agreement should not be pursued, as it did not reflect the true nature of the auction sale contract. He also said that he would decline to act if it were pursued. Ms Guttenbeil's evidence was that there was no mention of any sale and purchase agreement dated 2 August. In evidence in later proceedings in the High Court, Mr Phillips also said there was no mention of such an agreement.

[26] Ms Marr's evidence was that after the meeting with Mr Phillips she detached and discarded the handwritten pages of the 9 August agreement, and re-attached the front pages of the Q1 and S5 2 August agreements. Again, her evidence was that apart from replacing the front pages of the 9 August agreement, the Q1 and S5 agreements remained the same.

[27] On 13 August, Ms Marr made two alterations to the 2 August agreements. In the section where the settlement date is to be entered, she wrote "10 working days after the date of service of the settlement notice (excluding day of service)". In the section where further terms of sale may be inserted, she inserted a typed "contemporaneous settlement" clause as clause 18. Neither of these alterations was initialled by any of the named parties.

[28] On 16 August Ms Marr engaged Mr Atmore to act for her, and added his name to the 2 August agreements, as solicitor for the purchasers Keith and Charlotte Marr. On 16 August, Ms Marr saved an electronic copy of the S5 agreement, naming it as "S & P Contemporaneous Aug 13". She then emailed this to Mr Atmore.

[29] Ms Marr continued to seek mortgage funding, investigating around six possible sources, including Mr Barton. Settlement did not occur on the specified settlement date of 15 August. Ms Guttenbeil was then in breach of the auction sale contract, and was becoming increasingly concerned that she would be required to settle the purchase. She investigated the possibility of buying the property with her son, but he had difficulty raising finance. Mr Parkin was also becoming concerned as to his position.

[30] On 21 August, Ms Marr destroyed one of the original signed 2 August agreements, by chance the S5 agreement, after having been told by the Agency's Regional Manager that she should not have used an agreement bearing the Agency's branding. Accordingly, as from 21 August, the Q1 agreement was the only original signed agreement in existence, but there remained also the electronic copy of the S5 agreement.

[31] On 26 August, Ms Guttenbeil signed a deed of nomination, in which she nominated Mr Parkin as purchaser of the property under the auction sale contract. Her evidence was that she did so at Mr Parkin's invitation, and on Mr Phillips' advice, after she had completely lost faith in Ms Marr or her children being able to come up with the money to settle the purchase. She said that Mr Phillips had said to her that she was just keeping to the original agreement to name Mr Parkin as nominee on the auction

sale contract, as Ms Marr had instructed her to do. She further said that Mr Parkin had always been the back-up for her, in case Ms Marr could not buy the property.

[32] She advised Ms Marr of the nomination to Mr Parkin the same day. There was then an exchange of text messages and emails between Ms Marr and Ms Guttenbeil, in which Ms Marr expressed extreme concern regarding the nomination to Mr Parkin, and Ms Guttenbeil advised that she had signed it on the advice of her lawyer. In an email sent to Ms Guttenbeil, Ms Marr told her that she should "not fret", as her solicitor might be able to "stop this" as "you signed the Sale & Purchase agreement for my children on 2 August remember."

[33] Ms Guttenbeil said that at Ms Marr's request, she sent Mr Phillips a text message on 27 August, which she knew to be untrue, saying that she remembered signing a sale and purchase agreement for $435,000. She said that although Ms Marr asked her to do so, she did not mention the date 2 August. She said that Mr Phillips called her immediately, and asked why she had sent a false message, to which she responded that it was to help Ms Marr and her family buy a house.

[34] Ms Marr asked Ms Guttenbeil to send her a copy of the text to Mr Phillips, but Ms Guttenbeil refused. Her evidence was that, on Mr Phillips' advice, she deleted it from her cellphone.

[35] On 28 August, Mr Atmore emailed Mr Phillips a copy of the S5 2 August agreement, anticipating settling on "Friday". Mr Atmore asserted that Ms Guttenbeil's nomination of Mr Parkin was contrary to the agreement between Ms Guttenbeil and Keith and Charlotte Marr. Mr Phillips' response was that Ms Guttenbeil had not signed the 2 August agreement.

[36] Also on 28 August, Keith and Charlotte Marr signed a Deed of Nomination pursuant to which they nominated the trustees of the Marr Family Trust as purchasers under the 2 August agreement.

[37] At around this time, there was an exchange of text messages between Ms Marr and Ms Guttenbeil, in which Ms Marr asserted that they both knew that Ms Guttenbeil

had signed an agreement on 2 August, and Ms Guttenbeil asserted that they both knew that Ms Marr had altered figures on an agreement.

Court proceedings

[38] As noted earlier, the key issue in this case is whether Ms Guttenbeil signed a sale and purchase agreement on 2 August, and whether Ms Marr forged, or otherwise knowingly used, a forged sale and purchase agreement dated 2 August 2013. It is therefore relevant to consider judgments of the High Court and Court of Appeal, in which the 2 August agreement was considered. We were referred to the judgments in caveat proceedings issued by Ms Marr, and Keith and Charlotte Marr, in the High Court,[2] then appealed by Ms Marr to the Court of Appeal,[3] and in bankruptcy proceedings in the High Court brought by Mr Barry Parkin against Ms Marr, and Keith and Charlotte Marr.[4]

[39] We record that s 109(1) of the Act provides that:

> Subject to s 105 [which provides that the Tribunal may regulate its procedures as it thinks fit (subject to the rules of natural justice)] the Tribunal may receive as evidence any statement, document, information, or matter that may, in its opinion, assist it to deal effectively with the matters before it, whether or not that statement, document, or matter would be admissible in a court of law.

[40] The judgments of the High Court and Court of Appeal assist the Tribunal to deal with the matters presently before it, and have therefore been received as evidence

Caveat proceedings (High Court and Court of Appeal)

[41] On 29 August, Mr Atmore lodged a caveat on the title of the property on behalf of Keith and Charlotte Marr, preventing finalisation of the sale to Mr Barton. The caveat claimed that they had an interest in the land:

> Pursuant to an unconditional agreement for sale and purchase dated 2 August 2013 between [Keith and Charlotte Marr] as purchasers and [Ms Guttenbeil] as vendor, [Ms Guttenbeil] being purchaser under an unconditional agreement for sale and purchase dated 18 July 2013 under a

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2 *Marr v Parkin* [2014] NZHC 3269 ("High Court judgment").
3 *Marr v Parkin* [2015] NZCA 371 ("Court of Appeal judgment").
4 *Parkin v Marr* [2016] NZHC 2891 ("bankruptcy judgment").

> power of sale exercised by [Linkloan] under Memorandum of Mortgage 7667128.3.

[42] Keith and Charlotte Marr were subsequently required to make an application to sustain the caveat. Ms Marr was named as First Plaintiff, and Keith and Charlotte Marr were named as Second Plaintiffs. Mr Parkin was named as defendant. The electronic copy of the S5 2 August agreement was produced in support of the application. Ms Marr subsequently provided the original of the Q1 agreement for examination during the course of the proceedings.

[43] The caveat application was advanced on four causes of action, all of which were dismissed by his Honour Justice Faire. His Honour's finding on the second cause of action is relevant to the charge against Ms Marr, as it required him to decide whether the 2 August agreement was a genuine document.

[44] The original of the Q1 2 August agreement was examined forensically by a New Zealand Police document examiner, Ms Nicole Walker, who provided the Court with her opinion as to its authenticity. Justice Faire recorded Ms Walker's conclusions as follows:[5]

> The document which was produced and which bears the date 2 August 2013, was examined by Nicola Kay Walker who is a document examiner for the New Zealand Police. She outlined her training and experience. In her report she recorded a number of tests and examinations she had carried out on the contract. Her conclusion was the agreement could not be relied on as a genuine document. In particular, she concluded that Ms Guttenbeil's signature on the document was the result of an attempt to simulate, or copy, Ms Guttenbeil's natural signature style. In her opinion, it was not genuine.

[45] His Honour concluded:[6]

> When I weigh up the matters I have mentioned, and the circumstances surrounding that document, I conclude that it was not a genuine document and it was certainly not signed by Ms Guttenbeil on 2 August 2013.

[46] In dismissing the claim that Ms Marr, and Keith and Charlotte Marr, had a prior interest in the property arising out of the 2 August agreement, his Honour said:[7]

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5 High Court Judgment: *Marr v Parkin,* fn 2, above, at paragraph [24].
6 At paragraph [26].
7 At paragraph [71].

> For the plaintiffs to succeed it must be shown that the plaintiffs had an equitable interest prior in time to that of the defendant. The plaintiff's cause under this head fails because I have found that there was no agreement between Ms Guttenbeil and the second plaintiffs, dated 2 August 2013. The premise upon which this cause of action was based does not exist and therefore fails.

[47] An appeal by Ms Marr to the Court of Appeal against the dismissal of the first, third, and fourth causes of action in the caveat proceeding was dismissed. The Court recorded the following, regarding the 2 August agreement:[8]

> At trial, it was established that that Ms Guttenbeil's signature on the 2 August agreement was "not genuine", that is to say, Ms Guttenbeil's signature was forged. That finding has not been appealed. Ms Guttenbeil did not become aware of the 2 August contract until 26 August 2013.

[48] That the Court of Appeal agreed with his Honour Justice Faire's finding is demonstrated by its observations that:[9]

> By 15 August 2013, Ms Marr had made a number of unsuccessful attempts to raise the necessary money. She had even devised two dishonest schemes to improve her prospects of raising funds. Those schemes involved the forged 2 August 2013 contract and the 9 August 2013 contract, which misrepresented the purchase price and the deposit which had been paid.

and:[10]

> Although it does not arise, had we reached the stage of having to consider relief, we would have required considerable persuasion that Ms Marr's conduct warranted equitable intervention. Ms Marr's hands were far from clean.

Bankruptcy proceedings

[49] The Court of Appeal ordered Ms Marr to pay costs to Mr Parkin. When they were not paid, Mr Parkin issued bankruptcy proceedings against Ms Marr and Keith and Charlotte Marr. His application for bankruptcy adjudications was declined.[11]

[50] Having set out the essence of the High Court and Court of Appeal judgments, Associate Judge Christiansen referred to Mr Wain's submission that there was "proof

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8 Court of Appeal Judgment: *Marr v Parkin*, fn 3, above, at paragraph 19.
9 At paragraph [48].
10 At paragraph [53].
11 Bankruptcy judgment: *Parkin v Marr*: fn 4, above.

of fraud by the actions of Mr Barton in particular but also by Mr Parkin", and that there was evidence that "was not available, or its significance not fully understood by lawyers representing Ms Marr in the High Court or the Court of Appeal".[12] He recorded that "Ms Marr wishes to retain any rights of review or appeal open to her" and added that "It is not this Court's purpose at this time to evaluate her prospects in that regard".[13] The Associate Judge then recorded Mr Wain's submission that this was "a matter for proper consideration by reference to s 38 of the Act".[14]

[51] The Associate Judge exercised his discretion to decline bankruptcy adjudications against Keith and Charlotte Marr by specific reference to s 37 of the Insolvency Act 2006. This was on the grounds that it was not just and equitable to make the adjudications as they became involved to assist Ms Marr with the purpose of retaining the property, and they received no legal advice, so were not represented (except nominally) in Ms Marr's proceeding against Mr Parkin.[15]

[52] The Associate Judge considered that the situation affecting Ms Marr was different. We do not accept Mr Wain's characterisation of the grounds on which the application for a bankruptcy adjudication against Ms Marr was declined. He submitted that the Associate Judge declined the application "in order that she might have the opportunity to re-open the High Court litigation, on the basis that she was subject to a fraud, and the judgment obtained against her was by way of fraud".

[53] Section 38 of the Insolvency Act allows the Court to halt a bankruptcy application to enable a judgment debtor to challenge the judgment that gave rise to the judgment debt. Had it been the Associate Judge's intention to decline the application by exercising his discretion under s 38 (as sought by Mr Wain), he would have done so by specific reference to that section.

[54] However, that was not the basis on which Mr Parkin's application was declined. Rather, it was on the basis of the Associate Judge's assessment of the effect of a bankruptcy adjudication, after Ms Marr had "lost her job and income source". He

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12 At paragraph [40].
13 At paragraph [41].
14 At paragraph [42].
15 At paragraphs [51] and [52].

noted that Ms Marr's claims that Mr Parkin was implicated in a fraud in order to obtain the property for himself had been previously rejected, and called into question her own claims of the existence of the 2 August agreement that had been the focus of Mr Parkin's claim of dishonesty on her part.[16]

[55] The Associate Judge concluded:[17]

> The principles involved are about balance, justice and equity. These are not about punishment or reward nor is it only about Mrs Marr and Mr Parkin. A public interest perspective is required that goes beyond the interests of those parties involved.
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> There is good reason for Mrs Marr to reflect and regret what has since occurred. She has lost her job and income source. In that instance an order for bankruptcy would be punitive and serve no practical purpose for her or for public interest.

[56] We are conscious that the High Court and Court of Appeal judgments arose in the context of different proceedings. Nevertheless, the facts required to be considered in the Tribunal's consideration of the disciplinary charge arising out of Ms Marr's response to the mortgagee sale proceedings are no different from those considered in the High Court and Court of Appeal. In the circumstances, the findings in the High Court judgment, not disturbed by the Court of Appeal, are highly persuasive.

Expert evidence

[57] The Tribunal is faced, as was the High Court, with conflicting evidence. Ms Marr's evidence was that Ms Guttenbeil signed two originals of the 2 August agreement (that is, Q1 and the original of S5) on that day; Ms Guttenbeil's evidence was that she did not. Both maintained their evidence in cross-examination, both in the High Court and before the Tribunal. Expert evidence regarding the "M J Guttenbeil" signature appearing on the 2 August agreement was therefore critical.

[58] As recorded earlier, his Honour Justice Faire accepted Ms Walker's evidence (after examining the original Q1 agreement) and found that the "M J Guttenbeil" signature on the Schedule 2 of that agreement was not genuine. That finding was not

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16 At paragraphs [53] and [54].
17 At paragraph [57].

appealed. However, the authenticity of the "M J Guttenbeil" signature was again in issue before the Tribunal.

[59] Ms Walker is no longer employed by the Police. The Police Chief Document Examiner, Mr Gordon Sharfe, gave evidence that he had peer-reviewed Ms Walker's report, and had examined the documents with Ms Walker. He agreed with her conclusion that the Q1 agreement could not be relied on as being a genuine document.

[60] The original of the Q1 agreement was not available to the Tribunal. We were advised that it had been lost, at some point after the High Court hearing. The original of the S5 agreement (identical except for the date appearing on Schedule 2 of the agreement being written as "August 2 2013" rather than "2 August 2013") has not been available since it was discarded by Ms Marr on or about 21 August 2013.

[61] Prior to the hearing before the Tribunal, Mr Stephen Dubedat was engaged by Mr Wain to provide an opinion as to the authenticity of the "M J Guttenbeil" signature on the Q1 agreement. Mr Dubedat was, understandably, at a significant disadvantage by being unable to inspect the original of either the Q1 or S5 agreements.

[62] At the Tribunal's request, Mr Sharfe and Mr Dubedat conferred and prepared a joint memorandum regarding their examinations of the relevant documents. They detailed their points of agreement and disagreement. The Tribunal is grateful for this assistance provided to it. We summarise the memorandum as follows:

[a] They agreed that the "M J Guttenbeil" signature on Schedule 2 of the Q1 agreement is not (Mr Sharfe) or probably not (Mr Dubedat) a genuine signature of the writer of the specimen signatures provided by Ms Guttenbeil. Mr Dubedat's opinion was qualified due to his having only non-original documents for examination.

[b] They agreed that the "M J Guttenbeil" signature appearing on the Q1 agreement showed a high degree or uniformity with the signature on the S5 agreement. They agreed that a possible means of production of the "M J Guttenbeil" signature on the Q1 agreement is that the signature on the S5

agreement, or a copy of it, served as a model to produce the signature on Q1 through a simulation or tracing-type process. They also agreed that handwritten entries on Schedule 2 are the same on both the Q1 and S5 agreements.

[c] They agreed that the "MJG" initials on the Q1 agreement are pictorially similar to specimen initials provided by Ms Guttenbeil, but disagreed regarding authorship of those initials. Mr Sharfe's opinion was that the authorship examination was inconclusive because, despite the pictorial similarity, there were a number of differences, and there was a wide range of natural variation seen in the specimen signatures. Mr Dubedat's opinion that the "MJG" initials on the Q1 agreement were probably genuine was based on his assumption that all of the initials were written by the same author, and his instructions that the "MJG" initials on the S5 agreement could be used as specimen initials. This was notwithstanding that Ms Guttenbeil had denied writing them.

[d] They agreed that the "M J Guttenbeil" signature on Schedule 2 of the S5 agreement, and the "M J Guttenbeil" signature alongside the addition of Mr Parkin's name as nominee on the auction nomination provision are, for practical purposes, replicas; that is, one is a machine copy of the other, or both are copies of a common original. In Mr Sharfe's opinion, at least one of the signatures cannot have been genuinely signed, and is the result of some form of cut and paste simulation. In Mr Dubedat's opinion, the observations as to the signatures on S5 and the auction nomination provision cast a high degree of doubt as to the authenticity of at least one, and possibly both, of the signatures.

[e] They agreed that the "bowl" of the letter "G" on three of the "MJG" initials on the S5 agreement differ from the remaining initials. Mr Sharfe's opinion was that this was the result of an attempt to copy Ms Guttenbeil's natural initial style. Mr Dubedat noted that the initials on the S5 agreement were specimen signatures, and there was no reason to believe they were questioned. The Tribunal observes that, as noted earlier, Mr Dubedat was

instructed that the S5 agreement was to be used as a specimen document, notwithstanding that Ms Guttenbeil denied having signed or initialled it.

[63] Both Mr Sharfe and Mr Dubedat gave evidence and were cross-examined at the Tribunal hearing.

[64] Mr Sharfe confirmed his evidence that his and Ms Walker's conclusion that the original Q1 agreement could not be relied on as genuine rested on a combination of three factors: a simulated signature (on Schedule 2), a group of initials which showed unexplained differences between the questioned initials and specimen initials, and variations in production of the document which would not be expected in a document that had been printed as a whole, and signed as a whole.

Number of specimens used for examination

[65] Whereas Ms Walker and Mr Sharfe referred to three "specimen" documents, Mr Dubedat examined further documents, which included the electronic copy of the S2 agreement.

[66] Mr Sharfe rejected the proposition put to him that a minimum of ten specimen signatures was required for an opinion as to authenticity, whereas Ms Walker and he had used only three. He said that in the case of the "M J Guttenbeil" signature on the Q1 document, they saw disfluency and direction of stroke issues, and no matter how many specimen signatures you had, you would not expect to see that.

[67] Ms Walker was cross-examined in the High Court on the same point. Her response was that the three specimen signatures were consistent in their construction, fluently and speedily completed She also found a range of variation between the three signatures, which would be expected in a genuine signature. She was confident that three specimens were enough to base an opinion on.

[68] Mr Dubedat was asked in cross-examination to comment on the number of specimen signatures required for comparison. He responded that there was no "magical number", a "one-on-one" comparison could be done, but was never

recommended, and the more specimen sample signatures you had, the stronger the case for the questioned signature being genuine or not. He recommended a minimum of ten, but said that an examination could be done with fewer: there were other factors involved like the complexity of the signature. He added that a highly complex signature would be difficult to forge, and document examiners had some time ago done one-on-one comparisons of such signatures, although that was not now recommended.

[69] In re-examination, Mr Dubedat agreed that Ms Guttenbeil's signature is "quite lengthy" and "reasonably complex". When asked if there is "an increased probability of an incorrect analysis occurring if there's only three specimen signatures used", Mr Dubedat responded:

> The answer is yes, but its, when you have a complex signature you, which has been been done, with a complex signature, lots of changing directions, fluidly written, that's very important, if you have a signature with all those details in it, you actually need less signatures to be able to make a determination rather than a simple simplistic signature, so, so, having a smaller number of signatures, a complex signature, it doesn't help but (inaudible) you've got a complex signature which has been (inaudible) written, so you really need less samples, for a less complex signature while they make a variation in the signatures you need a lot more samples.

[70] In the light of Mr Dubedat's evidence that Ms Guttenbeil's signature was "quite lengthy" and "reasonably complex", and that fewer samples would be needed where there is a complex signature, we conclude that Mr Sharfe's and Ms Walker's comparison against three specimen signatures did not increase the probability of an incorrect analysis. We note that while Mr Dubedat would have preferred to have more specimens, he did not suggest that Mr Sharfe's and Ms Walker's conclusions were incorrect, or unreliable.

Writing surface

[71] We recorded earlier (at paragraph [17]) that Ms Marr and Ms Guttenbeil gave conflicting evidence as to where they sat at the café on 2 August. Mr Dubedat was asked in examination in chief to comment on the possible effect on handwriting where there is a rough surface underneath the paper written on. He responded that a rough surface would affect the written line, but as he had not examined the original of the Q1 agreement, he could not say whether that had occurred in the present case.

[72] Ms Walker was cross-examined on this point in the High Court. She could not give a conclusive response, but referred to research regarding rough surfaces which had identified specific characteristics that might be seen on a document signed on a rough surface. She had not seen any of those characteristics on the Q1 agreement.

[73] We accept Ms Walker's evidence.

Indentations

[74] Mr Sharfe was also questioned about indentations (impressions on a piece of paper caused by writing on a page or paper above it) of the initials and signatures of Keith and Charlotte Marr, observed on the Q1 agreement. In cross-examination, he was asked to decipher the text of the indentations. In re-examination, he said that it is not possible to determine when indentations have made their way onto a document: they can go onto a page at any time before or after the page was printed, or at any time before it is examined.

[75] We note Mr Wain's submission that the text of the indentations supports Ms Marr's evidence as to how and when the S2 agreements were created. We accept Mr Sharfe's evidence that it is not possible to determine when indentations made their way onto a document. In any event, Ms Marr's evidence that she had the 2 August agreements created at a print/copy centre, and that this was after a discussion with Ms Samu, was not disputed.

[76] Evidence as to the indentations was set out in Ms Walker's report, prepared for and submitted as evidence in the High Court proceeding. In the course of the Tribunal hearing, Mr Wain said that he was unaware of the evidence. Mr Dubedat did not refer to it in his statement of evidence. Mr Wain submitted in closing that:

> The High Court, which was not presented with the entire forensic analysis conducted by the Police and, in particular, was not provided with the highly relevant results of the indentation testing, found that the [2 August] agreement was not authentic for reason relating to Ms Marr's use of the document.

[77] He further submitted that:

> … if the complete police handwriting expert report including the indentation pages were not before the High Court, then the finding against Ms Marr ought to be considered in that light.

[78] No evidence was provided to support Mr Wain's submission that the High Court "was not presented with the entire forensic analysis conducted by the Police". Ms Walker's discussion of "indentations" was listed in the index on the first page of the report, and set out in paragraph 4.6 of her report. There was no suggestion that any of the paragraphs that preceded paragraph 4.6, or any of the paragraphs that followed paragraph 4.6 on the same page (paragraphs 4.7, 4.8, and 4.9) were omitted. There are no grounds on which we should consider the finding against Ms Marr in the light of the "entire police handwriting expert report" not having been before the High Court.

[79] Further, we note Mr Mr Dubedat's evidence that he was provided with Ms Walker's report and saw her evidence as to the indentations, but he did not make any enquiries or ask for copies of them.

Production of the forged agreements

[80] Both Mr Sharfe and Mr Dubedat were asked to comment on their statement in their joint memorandum that the "M J Guttenbeil" signatures on the auction nomination provision, and the S5 agreement, were for all practical purposes replicas of each other. They differed as to whether one was a copy of the other, or both copies of a common original. Mr Sharfe maintained his opinion that the signature on S5 is a machine copy of that on the auction nomination provision.

[81] Mr Dubedat was asked by Mr Wain to comment on whether the signature on the S5 agreement was used to produce the signature on the auction nomination provision, or vice versa. Other than to agree that the two signatures are replicas, Mr Dubedat would not give an opinion either way.

[82] We are not required to decide the point, but it is not material in our consideration of the authenticity of the Q1 and S5 agreements.

Our conclusions

[83] Having read Ms Walker's report and the statements of evidence of Mr Sharfe and Mr Dubedat, and having heard the oral evidence given by Mr Sharfe and Mr Dubedat, we are satisfied that the "M J Guttenbeil" signature on Schedule 2 of the Q1 agreement is forged. Having considered the evidence regarding the "MJG" initials, we are satisfied on the balance of probabilities that they cannot be relied on as genuine.

[84] In the light of Ms Marr's evidence that Ms Guttenbeil signed the originals of both the Q1 and S5 agreements at the meeting on 2 August, we find that neither Q1 nor S5 is genuine. We reject Ms Marr's assertion that the experts were wrong, and we reject Mr Wain's submission that the expert evidence cannot be regarded as conclusive, and does not marry with the overall facts, or with any specific event that occurred.

The charge

The 2 August agreements (Q1 and S5)

[85] As did his Honour Justice Faire, we have had the benefit of hearing oral evidence from Ms Guttenbeil and Ms Marr. There is no basis on which we would reach a different conclusion from his Honour.

[86] Ms Guttenbeil's evidence is supported by the experts' evidence (which we accept) that the Q1 agreement was forged. It is also supported by Mr Phillips' evidence in the High Court: that there was no mention of a sale and purchase agreement having been signed on 2 August when he discussed the 9 August agreement with Ms Marr and Ms Guttenbeil on 12 August, and he did not become aware of the 2 August agreement until the S5 agreement was emailed to him by Mr Atmore on 28 August.

[87] We reject Mr Wain's submission that in cross-examination in the High Court, Ms Guttenbeil "effectively admitted that the "M J Guttenbeil" signature on the Q1 agreement was her own". It is clear from the transcript of her evidence in the High Court that Ms Guttenbeil said only that the signature "could be" hers, but it belonged

to another document, and was used to insert on the Q1 agreement. Ms Guttenbeil said in the High Court, when asked a question in clarification:

> Q So, just so I, his Honour is clear, you are saying this signature could be yours but it wasn't made on the 2nd of August?
>
> A Yes 'cos I didn't sign an agreement on the 2nd of August. Because like I'm saying, that page was taken out of a different agreement and probably inserted in there that's the only way how, only way I could have that signature there and it was not related to this document at all because like I said, I didn't even know that existed 'til after the property is sold to Barry [Parkin].

[88] It cannot be inferred from the above exchange that Ms Guttenbeil "effectively admitted" that she had signed the Q1 agreement on 2 August 2013.

[89] In the light of Ms Marr's evidence that Ms Guttenbeil signed both the Q1 and S5 agreements at the same time, we accept Ms Guttenbeil's evidence that she did not sign the S5 agreement on 2 August 2013, or at any other time.

[90] We do not consider there to be any reasonable possibility that unbeknown to Ms Marr, some other person forged Ms Guttenbeil's signature on the Q1 and S2 agreements.

[91] Ms Samu advised Ms Marr that a sale and purchase agreement from Ms Guttenbeil to Keith and Charlotte Marr was essential for her to obtain funding. It was in Ms Marr's interest, and only hers, that an agreement for sale and purchase be prepared and signed in order to meet that aim. Further, the 2 August agreement was at all times in Ms Marr's sole possession and control up until she emailed an electronic version of the S5 agreement to Mr Atmore on 16 August. It was (on her evidence) used to create the 9 August agreement by replacing two pages, converted back into the 2 August agreement by reinstating two pages, and subsequently altered by her (including unilaterally inserting a "contemporaneous settlement" clause).

[92] We agree with Mr Waalkens' submission that it cannot be determined who committed the forgery of Ms Guttenbeil's signature on the 2 August agreement. However, we accept his submission that "Ms Marr was involved in one way or another in the forgery".

[93] We therefore find on the balance of probabilities that the Committee has proved particular (e) of the charge; namely that Ms Guttenbeil's signature was forged onto the 2 August agreement.

The remaining particulars

[94] As to other particulars of the charge, we are satisfied on the balance of probabilities that the Committee has proved that:

[a] *Ms Marr initially used Ms Guttenbeil as a front to hide the fact that she was the purchaser of the property (particular (a))*:

Despite Ms Marr's evidence that she openly disclosed this fact, she did not disclose it to the mortgagee, Linkloan, and there was no suggestion that the auctioneer made an announcement at the start of the auction that the owner was bidding. Had the auctioneer been told that Ms Guttenbeil was bidding on behalf of the mortgagee, such an announcement would have been made.

[b] *Ms Marr inserted "+/or nominee Barry Ian Parkins" into the auction sale contract, but did not send it to the mortgagee's agent (particular (c))*:

Ms Marr's evidence was that she instructed Ms Guttenbeil to make this insertion. The fact that this was at Mr Parkin's insistence (as part of his "Plan B" to protect him in the event that Ms Marr could not complete the purchase of the property) does not alter the fact that Ms Marr instructed Ms Guttenbeil to insert the words. There was no dispute that the auction nomination provision was not sent to the mortgagee or its agent.

[c] *Ms Marr used an Agency sale and purchase agreement in breach of the Agency's internal protocol (particular (b))*:

Ms Marr's evidence was that she took a blank Agency template form to a print/copy centre, and had them print information on it in order to create the 2 August agreement. Her evidence was that she handwrote information

on a blank Agency agreement in order to create the 9 August agreement. In each case, she used Agency resources to undertake a private sale. We accept the evidence given by Ms Dovey (Regional General Manager of the Agency) that any of their agents would have known that this was against Agency protocols.

[d] *Ms Marr inserted a "contemporaneous settlement" clause to the 2 August agreement (particular (f))*:

Ms Marr's evidence was that she amended the 2 August agreement by inserting a "contemporaneous settlement" clause, and that she did so unilaterally.

[e] *Ms Marr created a false sale and purchase agreement on 9 August, stating a purchase price of $560,000 and a deposit of $125,000 (particular (g))*:

Ms Marr's evidence was that she created this sale and purchase agreement by altering the 2 August agreement. Whether she did so at Ms Samu's suggestion does not alter the fact that she created the agreement, or that it was false: the purchase price was not $560,000, and a deposit of $125,000 had not been paid.

[f] *Ms Marr had a caveat placed on the property before Mr Parkin could settle the purchase, following his being nominated by Ms Guttenbeil (particular (h))*:

The caveat was founded on the S5 2 August agreement. In the light of our finding that the "M J Guttenbeil" signature on S5 was a forgery, she could not properly instruct her solicitor to lodge the caveat on the basis of the S5 agreement. Ms Marr used the forged S5 document to lodge a caveat.

Mr Barton and Mr Parkin

[95] Much of Ms Marr's evidence, and the cross-examination of Mr Parkin, focussed on her contention that Mr Barton, assisted by Mr Parkin, conceived and carried out a

fraudulent scheme to deprive her of her family home and to enable Mr Parkin to acquire it for himself. Mr Parkin was described as a "fraudster".

[96] The Tribunal was advised of Mr Barton's criminal convictions and the terms of imprisonment imposed. They were not in issue. We cannot speculate as to Mr Barton's intentions or motives. However, regarding Mr Parkin, we note that:

[a] Ms Marr accepted Mr Parkin's "mortgage sale rescue". She instructed Ms Guttenbeil to add the auction nomination provision in order to meet Mr Parkin's need for a safeguard for himself, should Ms Marr not be able to obtain sufficient funding to settle the auction sale contract entered into by Ms Guttenbeil on her behalf.

[b] Ms Marr was not able to secure funding, notwithstanding the efforts of Ms Shepherd and Ms Samu and other brokers. No evidence was submitted to the effect that Mr Barton or Mr Parkin interfered with those approaches.

[c] While Ms Guttenbeil's nomination of Mr Parkin to settle the auction sale contract was at Mr Parkin's invitation, she signed it on the advice of her solicitor after Ms Marr had failed to obtain funding, and when Ms Guttenbeil was faced with having to settle the contract (which she was not in a position to do).

[d] The Tribunal is not persuaded that there was anything untoward in Mr Parkin requiring conditions (including a nomination provision in his favour) on his agreement to pay the deposit on the auction contract, or in subsequently entering into a nomination agreement with Ms Guttenbeil.

[97] Further, the focus of this proceeding is on Ms Marr's conduct. Her evidence was that she created the 2 August agreements, and that Ms Guttenbeil signed two originals of it. Whatever Mr Barton and/or Mr Parkin may have intended, or done (and we were not required to, and do not, make any finding as to that), it is not relevant to the Tribunal's decision as to whether it accepts the evidence adduced by the Committee in support of the charges.

Should Ms Marr be found guilty of disgraceful conduct?

[98] Disgraceful conduct is, as set out in s 73(a) of the Act, conduct which:

> Would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful;

[99] As the Tribunal said in *Complaints Assessment Committee 10024 v Downtown Apartments Ltd (In Liq)*:[18]

> "The word disgraceful is in no sense a term of art. In accordance with the usual rules it is to be given its natural and popular meaning in the ordinary sense of the word."

[100] In considering the charge against Ms Marr, the Tribunal refers to the discussion of disgraceful conduct in the judgment of his Honour Justice Woodhouse in *Morton-Jones v Real Estate Agents Authority*; in particular, his Honour's discussion of s 73(a) of the Act.[19] His Honour said:[20]

> … If the charge is under s 73(a) the critical enquiry is whether the conduct is "disgraceful". Conduct which involves a marked and serious departure from the requisite standards must be assessed as "disgraceful", rather than some other form of misconduct which may also involve a marked and serious departure from the standards. The point is more than one of semantics because s 73 refers to more than one type of misconduct. In particular, s 73(b) refers to "seriously incompetent or negligent real estate agency work". Work of that nature would also involve a marked and serious departure from particular standards; the standards to to which s 73(b) is directed are those relating to competence and care in conducting real estate work.

[101] Thus, conduct charged against a licensee under s 73(a) may be found to be disgraceful (whether or not it is in the course of, or related to, real estate agency work) if it meets the ordinary meaning of "disgraceful", that is whether the licensee's conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful. When determining whether conduct was of that nature, the Tribunal takes into consideration the standards that an agent of good standing should aspire to, including any special knowledge, skill, training or experience such person

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18 *Complaints Assessment Committee 10024 v Downtown Apartments Ltd (In Liq)* [2010] NZREADT 6, at [55].

19 *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804.

20 At [29].

may have. The standard of proof required before the Tribunal can find a charge under s 73(a) proved is the balance of probabilities.[21]

[102] It is important not to conflate the two separate issues of liability (whether the conduct was disgraceful) and penalty (the consequences of a finding that conduct was disgraceful), which must be considered in dealing with a charge under s 73(a). The proper approach is that the Tribunal must:

[a] first consider whether the licensee's conduct was disgraceful, then

[b] secondly, if such a finding is made, consider whether the found conduct affects the licensee's fitness to hold a licence (see s 36(1)(c) of the Act and (for example) the Tribunal's decision in *Revill v Registrar*).[22] This enquiry is properly undertaken at the penalty stage.

[103] On the evidence before us, we find that Ms Marr's conduct, as found above, would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Result

[104] We find that the Committee has proved the charge against Ms Marr. We find her guilty of misconduct under s 73(a) (disgraceful conduct) of the Act.

[105] The Tribunal assumes that an oral hearing should be scheduled for hearing submissions as to penalty, rather than considering penalty on the papers. Counsel are to confer and advise the Tribunal's Case Officer as to whether and/or when a hearing is sought, and to suggest appropriate timetable directions for filing written submissions. In the event that an oral hearing is not sought, counsel are to confer and advise the Case Officer as to appropriate timetable directions.

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21 Pursuant to s 110(1) of the Act.

22 *Revill v Registrar* [2011] NZREADT 41.

[106] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

_____
Hon P J Andrews
Chairperson

_____
Mr G Denley
Member

_____
Mr N O'Connor
Member